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PROOF OF FOREIGN LAW.

The decision in *Bock* vs. *Lauman*, 12 Harris, 435, that the court will ascertain and apply foreign law to a case which is governed by it, without the aid of a jury, is worthy of some notice. It is believed that it has been the uniform practice to consider a rule of foreign law a matter of fact, to be ascertained as all other facts *in pais* are ascertained, and if this is to continue, it matters very little whether the tribunal to pass upon the question be the judge or the jury. But if the judge is to determine, the next inquiry must be, how is he to ascertain the fact? Our system makes no provision for the only mode by which this can be done, that is, by the testimony of experts. For how are the jury to give their verdict? Must they wait until the judge has determined his branch of the facts, and if not, when are the two verdicts to be moulded into one, and what is the remedy for an error *in fact*, in this respect; a motion for a new trial or a writ of error, and who is to be responsible for a false verdict? Are the judges, or the authors from whom they derive their information, to be liable for perjury, if they mis-state the fact? or is evidence to be received without any sanction for its truth? But perhaps there is another reason for the old rule. It being confessedly a matter of fact, and to be ascertained by evidence; if the plan adopted in *Bock* vs. *Lauman*, is to be followed, it is obvious that a man's rights must be decided upon proofs the existence of which he is ignorant of, and which, if presented, he may have the most abundant means of showing are unworthy of

credit. It has always been supposed, that the submitting evidence to the discussions of counsel before their effect is determined upon, and the right to know what is the evidence upon which one's rights are to be adjudged, with an opportunity to discuss it, are among the best methods of arriving at the truth; neither of these things are possible any longer. And further, how the rule is to be applied in error, it is difficult to understand. Is the court to reverse for error in fact, or re-try upon new evidence, or are they confined to the evidence submitted in the court below?

These considerations, and they are but a few of the more obvious, may make it worth while to consider whether there has not been some misunderstanding either of the rule or its application in practice.

Now if it be true that the proper mode of trying a question of foreign law, that is, the fact, what is the rule of conduct in another country upon a particular state of facts—is to read to a jury, codes, statutes, or the reports of decided cases—certainly the common law, which is generally thought to be eminently practical, has here fallen into a gross blunder. For can any thing be more absurd than to throw upon men, incompetent to express an opinion on a question arising under the law of their own country, the decision of the same question under that of another. But is this the proper way? Is it the form in which analogous cases are tried? If a question arises under the patent law, for instance, involving the results, either of a refined mathematical calculation or the law of chemical affinities, has it been hitherto thought necessary to instruct the jury in the elements of mathematical or chemical science? or does the occult nature of the fact authorize the judge to assume the province of the jury? Do we not rather resort to the testimony or opinions of experts on the *exact point* or question of fact in issue? Precisely so with foreign law, if our rule is but understood. And infinitely greater is the necessity for this mode of dealing with the question. For unlike laws of science, there is in regard to municipal law, a traditionary law or practice with which the readers and hearers are assumed to be familiar, and without which an attempt practically to apply the commands of a statute or the directions of a judge, would most frequently lead to gross absurdity. It is almost

impossible fully to appreciate the difficulty which arises out of this element in dealing with a question of law not of the country in which we live; and besides a law of science is not liable to be repealed or overruled, which sometimes occurs in municipal law.

For such reasons as these, doubtless, it was that the English law declared the existence of a rule of foreign law to belong to the province of the jury, because it must be proven by experts, speaking—not to the abstract question, nor assigning reasons for the rule, but simply swearing to the existence of a rule, if there be one. Thus we find in *Cocks* vs. *Purday*, 2 C. & K. 269, that the expert must state the law upon his responsibility, and should not be permitted to read scraps of a code; and in *Baron De Bodes' case*, 8 Q. B. 208, the jurist was permitted to state the law of his country, though enacted in a code, without producing a copy. Thus reversing a rule of evidence, universal, when the meaning of a writing is to be ascertained, because, *the point was not what the code said, nor even what it meant*—but what was the rule of law which had been deduced by the courts and community from that code. The language of Lord Denman is: "Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its *effect*, and the state of the law resulting from it. *The mere contents, indeed, might often mislead persons not familiar with the particular system of law. The witness is called upon to state what law does result from the instrument.*" Coleridge, J.'s remarks on pp. 265–6, are not the less pointed and conclusive.

Surely this is not remarkable when we look at our own law. What a figure a foreigner would present, to be sure, who would undertake to advise a course of action guided by our statutes, even when aided by our reports. What foreigner could pretend to certainty in not having overlooked some later statute or an unpublished decision. An instance or two, which accident has thrown in our way, may illustrate the result of these attempts at universality.

Thus, for instance, no less a person than Geo. Jos. Bell, professor of the law of Scotland, in the University of Edinburgh, in his Contract of Sale, p. 59, says, "on the proof of sale (of chattels) by the law of America:" "The law of the United States of America, in this matter, is grounded on the law of England, and has, indeed,

been settled nearly on a footing of the English statute of frauds as applicable to all contracts for the sale of goods or chattels for the price of $50 or more." "The statute of frauds as thus adopted in America, has, a few years ago, been reconstructed by the legislature of New York, and the rules as so fixed, are proclaimed in the revised statutes." Then laying down the rule as it formerly stood under "the American statute of frauds," as settled by some decisions, the references to which are either misprinted or impossible, probably meaning those of Maryland, he proceeds to show the changes effected in the American statute by the *revised American statute.*

Now, our ten fingers would scarce serve to count the blunders in these two pages. So gross that a witness stating the law in this wise would be convicted of perjury. Yet why should Pennsylvania judges suppose that in examining questions of foreign law they are more likely to be right than this learned professor? Are they better trained? Have they better sources of information? The clear and elegant treatise of Kent has thus been honestly converted into nonsense by an excellent and learned jurist, simply because he assumed he knew what he was utterly ignorant of, the *practical* law of another State.

Even in a case much nearer home, and where the court was exercising a jurisdiction which required them to administer our law, and in which the decision was undoubtedly right, we see a judge clearly of the opinion that every thing done in the Common Pleas under an assignee's account, if that was filed voluntarily, is coram non judice, *Shelby* vs. *Bacon*, 10 How. 68. It would be difficult to find a Pennsylvania lawyer who could be brought to doubt whether any distinction exists between such a case, and one commenced by citation and attachment. Yet evidently the learned judge of the Supreme Court of the United States, was entirely unaware both of our rules of practice and procedure, and of the effect which attaches to a proceeding upon which millions of property have depended.

No case can be stronger than occurred in *Wildes* vs. *Savage*, 1 Story, 22. The question was, whether a letter promising to accept a particular bill of exchange, could be, by the law of England, treated as an acceptance by a person to whom the letter was not ad-

dressed. Lord Mansfield and his associates had twice decided that it could. Mr. Justice Story and the Supreme Court of the United States had followed suit, and it was confessed that those decisions of the King's Bench had never been overruled. Yet it appeared on the oaths of such men as Pollock and Hill, that this was no longer the law, and indeed never had been law but during Mansfield's presidency, and the fact was decided accordingly.

What would have been the effect of Mr. Justice Story attempting to ascertain from books the law of England, on a subject that he probably deemed himself as well informed on as any English judge? Why merely to make a man liable under a contract which by the law of the land never existed. So in a case of the greatest practical importance, the right of a pledgee to tack a subsequent advance, the same learned judge, 2 Story's Equity, sec. 1034, evidently laying down the English rule, for eighteen English decisions and but one American are cited, is so wide of the mark, that when the point really came up for discussion in *Chilton* vs. *Carrington*, 15 Com. Bench, 102, counsel familiar with their municipal law could not cite one of his eighteen authorities in support of the proposition, nor would the court hear an argument against the alleged rule, so utterly was it without foundation in their law.

When, therefore, we find, that even such a writer as Kent cannot make himself sufficiently clear to a Scotch jurist, to enable him to give an outline of the American law not absolute nonsense, and that so anxious a seeker for English law as Mr. Justice Story, should have fallen into such palpable blunders on such apparently plain and practical questions, it really seems that it would be safer to proceed in the old way of ascertaining *facts*, by inquiring of competent witnesses under oath, rather than trust to the chance of the judge's knowledge, either acquired or intuitive.

LIABILITY OF AGENT OF KNOWN PRINCIPAL.

It seems curious that the liability of an agent on contracts entered into by him on behalf of a known principal should be so often a matter of doubt as it is. Contracts of this sort are of every day occurrence, and it may be assumed the agent knows whether he